Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 85-1383

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

KAONOHI OHANA, LTD.

Petitioner,

vs.

NANCY E. SUTHERLAND, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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Hawaii Revised Statutes:
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I. FACTUAL CLARIFICATIONS

Respondents, at page 4 of their Brief In Opposition To Petition for Writ of Certiorari, inaccurately assume that a contract for sale of the 5.36 acres of vacant fee simple beachfront property on

the Island of Kauai became binding between Petitioner Kaonohi Ohana, Ltd. and Respondent. Thus, Respondents mistakenly conclude that Kaonohi Ohana repudiated its contract with Respondents when it accepted the actor Sylvester Stallone's offer to purchase the property. This inaccurate assumption must be corrected. As stated in the ruling which should have been accorded special consideration by the appellate court, the United States District Court for the District of Hawaii declared in its Decision and Order:

> After further negotiations, Brown accepted Sutherland's offer <u>on behalf of the board of directors</u>. The parties agreed that shareholder approval of the sale, if required, would have to be obtained by June 29, 1984, the closing date.

> Several weeks before the closing date, Kaonohi Ohana received an offer from Sylvester Stallone to purchase the property for $1.75 million. Kaonohi Ohana accepted that offer subject to the rights, if any, of Sutherland.

Appendix A-3 to Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit (Emphasis added). As the Court further noted:

> Kaonohi Ohana was formed for the purpose of selling the property in order to pay off Ferreira's creditors and, apparently, Ferreira himself. Clearly all of the claimants have an important stake in the sale of the property, the corporation's only asset, since the satisfaction of their claims depends on the terms of the sale. Accordingly, it would seem imperative that their consent be obtained.

Appendix A-6 to A-7. While the opinion of the United States Court of Appeals for the 9th Circuit, 776 F.2d 1425 (9th Cir. 1985)(Appendix A-9 to A-20), which necessitated this Petition, determined consent of shareholders was not required, the appellate court did "...not reach the issue of whether [Kaonohi] corporation in fact complied with the requirements of Sec. 416-33 [governing authorization or approval of the sale]. Sutherland v. Kaonohi Ohana, Ltd., 776 F.2d 1428, n.6, (Appendix A-20). Thus, it has not been judically determined that a contract came into existence between Kaonohi Ohana and Respondent.

II. RESPONDENT INCORRECTLY ASSUMES THAT KAONOHI SHOULD HAVE "REQUESTED" THE APPELLATE COURT TO GIVE SPECIAL CONSIDERATION TO THE DISTRICT COURT'S INTERPRETATION OF STATE LAW.

All circuits except the Ninth Cir uit give special consideration, great weight, great deference or substantial deference to the local district court's interpretation of state law. See, Dissent In and Appendix to Matter of McLinn, 739 F.2d 1395, 1403-1412 (9th Cir. 1984)(en banc).[1] As Respondents correctly noted, Kaonohi Ohana stated the standard of review in the appellate court was a de novo review of orders granting or denying motions for summary judgment. What

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[1] The Ninth Circuit announced its abrupt departure from the other circuits in McLinn, supra.

misunderstands is, in exercising this de novo review, all circuits except the Ninth Circuit give "great weight" or "deference" to the decision of the local federal courts not because they have been "requested", but as "a responsible exercise of appellate authority". McLinn, supra, 739 F.2d at 1406. In his vigorous dissent in McLinn, supra, Circuit Judge Schroeder, joined by dissenting Chief Judge Browning and Circuit Judges Anderson, Tang and Ferguson declared:

> Appellate courts exercise de novo review over all questions of law, whether state or federal. Appellate courts may, and as the cases demonstrate overwhelmingly, do substitute their judgements for the judgments of district courts on state as well as federal issues. By giving "substantial deference," or what I believe to be the better phrase, "great weight," to the decisions of the

> district courts, appellate courts do not suspend their own thought processes. They treat the expertise of the district judge in local law as a factor that requires a careful review of the district court's decision before the appellate court reaches a different conclusion. The circuits have not, as the majority would have us believe, been guilty of a massive "abdication" of responsibility.
>
> ...
>
> The special weight that should be given to a district court's decision is not intended to make our examination any less thorough or independent. It is intended to make us more careful. Its purpose is to prevent hasty and perhaps arbitrary decisions in areas of local law with which we may not be fully familiar. Giving special consideration to a district court's decision on a state law question is a responsibile exercise of appellate authority.

McLinn, supra, 739 F.2d at 1404, 1406. In other words, in their exercise

of their appellate jurisdiction, all circuits except the Ninth in their de novo review afford great weight or deference to the district courts' decisions on state law questions.[2]

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[2] As noted in the dissent, "[t]he most regrettable aspect of [McLinn] decision is the message it sends to the district courts and the litigants. It suggests to the district courts that time spent thoroughly explaining a state law question is time wasted; we therefore will be deprived of their expertise. At the same time, the majority signals to litigants that reversals will be easier to obtain, thus encouraging more appeals. The inevitable result is that we will be faced with more state law issues, but provided with less guidance. The majority offers this result without any attempt to demonstrate that the standard it now decries has led to unfairness or incorrect results. McLinn, supra, 739 F.2d at 1406.

CONCLUSION

Because of the Ninth Circuit's refusal to accord weight or deference to the decision of the Federal district court's interpretation of state law, this Court should rule upon the substantial, important and recurring questions presented in this Petition and thereby resolve the conflict between the Ninth and other circuits.

RESPECTFULLY SUBMITTED,

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